Supreme Court, U.S.
FILED
APR 17 1998
CLERK

No. 97-1340

In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO, CLC,
PETITIONER

v.

PERFORMANCE FRICTION CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in concluding that the National Labor Relations Board exceeded its remedial authority (a) in ordering the employer to rescind a new and stricter disciplinary system that discouraged employees from supporting the union's organizing campaign, which was determined to violate Section 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (3); and (b) in ordering the employer to reinstate with backpay all employees discharged pursuant to it.

2. Whether the court of appeals erred in accepting the employer's representation that it had in fact offered reinstatement to six unlawfully discharged employees, thereby tolling the accrual of backpay, rather than permitting the Board to determine the facts in a compliance proceeding.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 117 F.3d 763. The decision and order of the National Labor Relations Board (Pet. App. 16a-23a), and the decision of the administrative law judge (Pet. App. 24a-69a), are reported at 319 N.L.R.B. 859.

JURISDICTION

The judgment of the court of appeals (Pet. App. 72a-77a) was entered on August 8, 1997. Petitions for rehearing were denied on November 17, 1997. Pet. App.

70a-71a. The petition for a writ of certiorari was filed on February 17, 1998 (a Tuesday following a Monday holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Respondent Performance Friction Corporation (PFC) manufactures automotive brake pads at a plant in Clover, South Carolina. Pet. App. 2a, 26a. In February 1994, petitioner, United Automobile, Aerospace & Agricultural Implement Workers (Union), began an organizing campaign among the employees at the Clover plant. *Id.* at 3a, 26a. In response to the Union's organizing efforts, PFC implemented a new and stricter disciplinary system, which made it easier for PFC to discharge employees. *Id.* at 3a, 7a-8a, 58a-59a. PFC also discharged employees pursuant to the new disciplinary system. *Id.* at 4a, 8a, 18a.

2. Acting on charges filed by the Union, the General Counsel of the National Labor Relations Board (Board) issued a complaint against PFC. Pet. App. 24a. After a hearing, the Board agreed with the administrative law judge by finding that PFC violated Section 8(a)(1) and (3) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(1) and (3), in three ways: by instituting the new disciplinary system "to discourage union activity and to rid itself of union activists" (Pet. App. 16a & n.1, 59a-60a; see also *id.* at 33a-40a); by discharging, pursuant to the unlawful new disciplinary system, employees Hinson, Rowe, Steele, Hudson, Kennedy, Meyers, Young, Teague, and other unnamed employees (*id.* at 18a; see also *id.* at 41a-50a, 60a-61a, 63a); and by discharging employee Montecon, albeit not pursuant to the unlawful new

disciplinary system. *Id.* at 17a n.2, 18a; see also *id.* at 50a-53a, 61a-63a.

As a remedy, the Board ordered PFC to "[r]escind the new and stricter disciplinary system"; to reinstate with backpay Hinson, Rowe, Steele, Hudson, Kennedy, Myers, Young, Teague, and "any other employees unlawfully discharged pursuant to the new disciplinary system"; and to reinstate Montecon with backpay. Pet. App. 19a-20a. The Board added that, in a subsequent compliance proceeding, PFC would be afforded "the opportunity to show that it would have taken the same action towards any of the additional unnamed discriminatees, even without the revised disciplinary policy." *Id.* at 18a n.3.

3. The court of appeals found substantial evidence to support the Board's findings that PFC "unlawfully implemented its new disciplinary system * * * to discriminate against the Union and union adherents" (Pet. App. 7a-8a); that PFC "used this new system to discourage union activity and thin its ranks of union activists by unlawfully discharging Hinson, Kennedy, Rowe, Steele, and Hudson" (*id.* at 9a); and that PFC fired Montecon "in retaliation for his pro-Union activities." *Id.* at 10a. The court thus enforced that portion of the Board's order requiring PFC to reinstate with backpay those six employees. *Id.* at 15a.

The court also concluded, however, that the Board "exceed[ed] its remedial authority when it ordered [PFC] to cease and desist from enforcing, and actually rescind, the new disciplinary system, and to reinstate with backpay *all* employees who had been discharged under that system, whether or not anti-union animus underlay their discharges." Pet. App. 10a. The court stated that "it does not follow from the

fact that a company adopts a particular policy out of impermissible motives, that its application of that policy in all instances will have the impermissible discriminatory effects reached by the Act." *Id.* at 11a. The court added that the new disciplinary system was "facially neutral" (*ibid.*), and that "[t]here is absolutely no evidence that any individual other than the five known Union activists discharged under the new disciplinary system, was so discharged because of his union affiliation or sympathies." *Id.* at 12a.

Accordingly, the court directed the Board on remand to modify its remedial order "so as to permit the company to retain in effect its disciplinary policy * * * unless substantial evidence develops that that policy is being enforced in a manner discriminatory toward the Union or the company's pro-union employees." Pet. App. 15a. The court further directed the Board "not [to] require the company to reinstate with backpay * * * any * * * employee except [Hinson, Kennedy, Rowe, Steele, Hudson, and Montecon] until such time as it is proven that their discharges were the consequence of their pro-Union affiliation or sentiments." *Ibid.*

DISCUSSION

1. Section 8(a)(3) of the Act makes it an unfair labor practice for an employer to "discriminat[e]" with regard to hiring, tenure, or terms or conditions of employment in order to "discourage membership in any labor organization." 29 U.S.C. 158(a)(3). In this case, the court of appeals concluded that substantial evidence supported the Board's finding that PFC "unlawfully implemented its new disciplinary system * * * to discriminate against the Union and union adherents." Pet. App. 7a-8a. In such circumstances,

the Board typically orders the employer to rescind the new, unlawful disciplinary policy, as well as the discipline that may have been meted out thereunder.[1] The Board similarly issued appropriate orders to restore the status quo in this case. See Pet. App. 19a-20a. Accordingly, we agree with petitioner (Pet. 10, 14-19) that, having upheld the Board's unfair labor practice finding, the court of appeals erred in refusing to uphold the Board's order requiring rescission of PFC's unlawful disciplinary policy and in limiting the Board's reinstatement and backpay award to only those employees discharged by PFC under that disciplinary policy who were shown to be pro-Union.

The Board did not file its own petition for a writ of certiorari, however, because the Fourth Circuit has articulated the correct remedial principles, both before and after its disposition of this case. In *NLRB* v. *Frigid Storage, Inc.*, 934 F.2d 506, 510 (1991), for example, the Fourth Circuit recognized that "[a] new system for discipline violates the Act if implemented in retaliation for union activity" and that "[l]ayoffs intended to 'discourage membership in any labor organization' violate the [Act], even if the employer

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[1] See, *e.g.*, *Hyatt Hotels Corp., d/b/a Hyatt Regency Memphis*, 296 N.L.R.B. 259, 259-263, 265-266 (1989), enforced in relevant part, 939 F.2d 361 (6th Cir. 1991); *Electri-Flex Co.*, 228 N.L.R.B. 847, 847-848, 849-850 (1977), enforced in relevant part, 570 F.2d 1327 (7th Cir.), cert. denied, 439 U.S. 911 (1978). See also *NLRB* v. *Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263 (1969) (Board may fashion remedies "fall[ing] within the general purpose of making the employees whole, and thus restoring the economic status quo that would have obtained but for the company's wrongful [conduct]"); *ABF Freight System, Inc.* v. *NLRB*, 510 U.S. 317, 324 (1994) (Board's remedial views "merit the greatest deference").

wields an undiscerning axe, and anti-union employees suffer along with their pro-union counterparts." (citation omitted). The court thus enforced a Board order that required the employer, among other things, to cease and desist from continuing to use an unlawfully implemented written warning system, and to rescind the written warnings issued pursuant to it. *Ibid.*; see *Frigid Storage, Inc., d/b/a Economy Foods*, 294 N.L.R.B. 660, 662-663 (1989). Similarly, in *Alpo Petfoods, Inc.* v. *NLRB*, 126 F.3d 246 (1997), the Fourth Circuit observed that "[e]ven when the axe is wielded in accordance with seniority rules, courts enforce the Board's order as to all discharged employees, not just those whom the employer was explicitly targeting." *Id.* at 256.[2] The court's failure to apply that rule in this case thus appears to be based entirely on its interpretation of the facts, and not a reassessment of the applicable legal standard.

2. Petitioner also contends (Pet. 12-13, 22-28) that, in framing the judgment in this case, the court of appeals erred in specifying that PFC's backpay obligation toward unlawfully discharged employees Hinson, Kennedy, Rowe, Steele, Hudson, and Montecon

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[2] Petitioner asserts (Pet. 28) that the present case cannot be regarded as an "aberration" because, in the subsequent case of *Eldeco, Inc.* v. *NLRB*, 132 F.3d 1007 (1997), "another panel of the Fourth Circuit repeated the same mistake." However, in *Eldeco*, unlike the present case, the court concluded that the evidence did not support the Board's finding that the employer's new drug testing policy violated Section 8(a)(1) of the Act; accordingly, the court "den[ied] any recovery related to the drug testing policy." 132 F.3d at 1012. The *Eldeco* court did not refer to the instant case in so holding, nor did it address the scope of the Board's remedial authority in cases where the employer's new policy is found to be unlawfully motivated.

continued to accrue only "up until they declined to accept [PFC's] offer of reinstatement." See Pet. App. 74a. According to petitioner (Pet. 24-25), the court's ruling was based on a representation, made by PFC's counsel, that PFC had in fact offered reinstatement to the six employees, whereas the court should have allowed the Board to address that factual question in a compliance proceeding.

However, the court's tolling of the employees' back-pay award is consistent with the law that would apply in a compliance proceeding if, in fact, the employees received valid offers of reinstatement from PFC. See, *e.g.*, *Hoffman Plastic Compounds, Inc.*, 314 N.L.R.B. 683, 683 (1994). While the court should have permitted the Board to determine the facts in the first instance, the court's failure to do so does not present an issue of sufficient importance independently to warrant this Court's review.

CONCLUSION

For the foregoing reasons, although the court of appeals should have enforced the Board's order without modification, the Board did not file its own petition for a writ of certiorari. However, should the Union's petition be granted, the Board will defend its decision and order.

Respectfully submitted.

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